Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
	)	
	)	

To: The Commission

PETITION FOR RECONSIDERATION OF DOBSON CELLULAR SYSTEMS, INC.

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SUMMARY

Dobson Cellular Systems, Inc. ("Dobson"), a competitive eligible telecommunications carrier ("ETC") and significant contributor to the universal service fund ("USF"), agrees that increased accountability for *all* ETCs can bring needed discipline to the size of the fund. In this petition, however, Dobson requests that the Commission reconsider certain aspects of its new rules that are impracticable to implement or inconsistent with the regulatory regime for wireless ETCs.

First, the Commission should reconsider the new "network improvement plan" obligations. While all ETCs must satisfactorily demonstrate their commitment and ability to provide the supported services, the five-year planning requirement will not achieve these goals. It demands a degree of detail beyond what can be predicted with any accuracy so far in advance, and requires reporting at the ILEC wire center level, a basis that has no relevance for CMRS providers. It diverts attention from the proper inquiry, on how an ETC has used funding to provide the supported services, onto whether an ETC has met illusory goals. The new rule also focuses excessively on "upgrading" of facilities at the expense of their provision and maintenance.

The Commission also should reconsider its statements that states may determine, pursuant to state law, what constitutes a "reasonable request for service," and encouraging states to harmonize ETC build-out requirements with existing state policies regarding line extensions and carriers of last resort. While Congress gave the states authority to designate ETCs, there is no reason to believe that that authority permits states to violate other Congressional and Commission policies. The scope of a reasonable request for service is a matter of federal law, and line-extension and carrier-of-last-resort policies are preempted entry regulations. These types of rules also can result in prohibited rate regulation.

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Dobson Cellular Systems, Inc. ("Dobson"), on behalf of itself and its affiliated wireless carriers,[1] hereby seeks reconsideration of certain aspects of the Commission's recent *ETC Criteria Order*.[2] Specifically, Dobson seeks reconsideration of the imposition of a detailed, five-year "network improvement plan" requirement, and of the Commission's holdings that states may determine what constitutes a "reasonable request for service" for Commercial Mobile Radio Service ("CMRS") carriers seeking or holding designations as eligible telecommunications carriers ("ETCs"), or apply state line extension or carrier of last resort obligations to such carriers.

Dobson, through its various subsidiaries and affiliates, is licensed to provide wireless telecommunications service in predominantly rural portions of 16 states stretching from Alaska

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[1] Dobson and American Cellular Corporation ("ACC") are wholly-owned subsidiaries of Dobson Communications Corporation. ACC is managed by Dobson pursuant to a management agreement. Both Dobson and ACC hold Cellular Radiotelephone Service and Personal Communications Service licenses.

[2] *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report & Order, 20 FCC Rcd 6371 (2005) *("ETC Criteria Order").*

to New York. A significant contributor to the universal service fund ("USF"), Dobson provides service to approximately 1.6 million subscribers throughout its service areas. Dobson set itself apart as one of the first rural-focused wireless carriers to roll out digital service throughout its entire service area, and to offer local, regional, and nationwide rate plans substantially similar to large nationwide wireless service providers. Most recently, Dobson has completed its roll-out of an overlay of both GSM/GPRS and EDGE technology on its existing TDMA networks, which will bring rural consumers the benefits of additional advanced data and information services.

Dobson has been an active participant in the Joint Board's and the Commission's various proceedings related to universal service funding issues generally and the ETC designation process specifically. Dobson and/or ACC have successfully pursued ETC designation in Michigan, Wisconsin, Oklahoma and Texas, and have ETC petitions pending in Oklahoma, Kentucky, and Alaska as well as a bifurcated petition before this Commission for designation in New York, filed May 10, 2004.[3] Thus, Dobson has a wealth of experience with varying ETC designation processes, and a strong interest in the integrity of ETC proceedings.

As a significant contributor to the universal service fund, Dobson strongly believes that the fund should be no larger than necessary to achieve universal service goals. Dobson also agrees that increased accountability for *all* ETCs is one legitimate means of increasing discipline in the fund. In this petition, Dobson requests that the Commission reconsider certain aspects of the new rules that are impracticable to implement or inconsistent with the regulatory regime for wireless ETCs.

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[3] Dobson has ETC petitions pending in Alaska, Oklahoma, Kentucky, and Michigan, , as well as a bifurcated petition before this Commission for designation in New York, filed May 10, 2004.

I. THE COMMISSION SHOULD RECONSIDER THE NEW "NETWORK IMPROVEMENT PLAN" OBLIGATIONS

While Dobson agrees that all ETCs must satisfactorily demonstrate their commitment and ability to provide the supported services, the *ETC Criteria Order's* five-year "network improvement plan" requirement will not provide meaningful documentation of that commitment and will impose substantial unnecessary burdens – especially if adopted by state commissions, as urged in the *ETC Criteria Order*.[4]

First, five years is too far into the future to expect carriers to project their network expenditures. In Dobson's experience, carriers develop capital budgets on an annual basis. Changes in circumstances from year to year generally preclude accurate budgeting more than twelve months in advance. Particularly for ETCs without a guaranteed rate of return, such as wireless ETCs, the prioritization of projects can depend upon the availability of other financing, which changes with the financial markets and the financial position of the company. Although there is never any question that USF funds will be spent on the provision, maintenance, and upgrading of facilities to provide the supported services in the designated areas, the priority of individual projects will vary from year to year as overall budget levels change.

While it may be possible to make general projections somewhat beyond one year, the new rules would effectively hold carriers to these commitments by requiring annual reporting on progress towards completion of the plan.[5] This may lead some carriers to make imprudent investments simply to avoid the need to modify the plan, or to squander resources justifying deviations from the plan (assuming deviations are permitted). The new rules contain no

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[4] *ETC Criteria Order* at ¶ 58.

[5] 47 C.F.R. § 54.209(a)(1) (as amended).

provisions for modification of the plan.[6] At the very least, if it insists on maintaining a five-year planning requirement, the Commission should provide clear and minimally burdensome procedures for carriers to modify their plans on an annual basis and to explain deviations from the plan that are nevertheless consistent with the statute and the rules.

Second, the new rules require an unreasonably burdensome degree of specificity and detail in the network improvement plans, particularly given the long timeframe involved. Wireless ETC applicants will be required to:

> demonstrate how signal quality, coverage or capacity will improve due to the receipt of high-cost support; the projected start date and completion date for each improvement and the estimated amount of investment for each project that is funded by high-cost support; the specific geographic areas where the improvements will be made; and the estimated population that will be served as a result of the improvements.[7]

Changing circumstances make it difficult to ascertain any of these data points with certainty over a single year, let alone five years. Project start and completion dates and specific project locations are often dependent on outside contractors, local governments other entities such as tower owners, all of whom are outside the ETC's control. The percentage of projects that will be funded with support will depend, as noted above, on the overall budgetary position of the company, which changes from quarter to quarter.[8]

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[6] *See* 47 C.F.R. § 54.209(a)(1) (as amended). The new rules require carriers to submit "an explanation regarding any network improvement targets that have not been fulfilled," *id.*, but do not make clear that such explanations will be accepted.

[7] 47 C.F.R. § 54.202(a)(1)(B) (as amended).

[8] Application of these overly burdensome requirements is equally troubling in light of the fact that the Commission never discussed why it needed to go beyond the certification requirements it imposed in *Virginia Cellular* and *Highland Cellular*. *Federal-State Joint Board on Universal Service; Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia,* CC Docket No. 96-45,
(continued on next page)

Because of these variables, any five-year plan a carrier submits will be at best a good-faith projection. And yet the structure of the new rules turns the regulatory review process on its head by focusing on ETCs' progress toward meeting illusory projections rather than on actual progress, in prior periods, in providing, maintaining, and upgrading facilities to provide the supported services.

Third, the new rules require the data to be submitted at the wire center level, even though the ILEC wire center has no relationship to wireless ETCs' network engineering, design, or construction process. As a result, requiring wireless ETCs to report at the wire center level will reduce, rather than increase, the accuracy and usefulness of the data submitted. The burden of creating reports using geographic delineations that have no bearing to the operation of a wireless carrier will also have the effect of unnecessarily increasing the reporting cost of a wireless ETC and reducing other resources that otherwise would be available to provide needed services to the consumer. Instead, Dobson urges the Commission to require competitive ETCs to report their plans and progress within their designated ETC service areas. Alternatively, ETCs that are

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Memorandum Opinion and Order, 19 FCC Rcd 1563 (2004) ("*Virginia Cellular*"); *Federal-State Joint Board on Universal Service; Highland Cellular, Inc. Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia*, CC Docket No. 96-45, *Memorandum Opinion and Order*, 19 FCC Rcd 6422 (2004) ("*Highland Cellular*"). Dobson has consistently argued that the Commission should give the Virginia Cellular requirements time to work to determine if such requirements were adequate to meet the stated goals of the Commission. *See, e.g.*, Dobson Reply Comments, CC Docket No. 96-45, at 3-4 (filed Sept. 21, 2004) ("The Commission should not adopt the Joint Board's proposed guidelines and instead should 'stay the course' with respect to the public interest requirements and eligibility conditions set forth in *Virginia Cellular* and *Highland Cellular*. … No commenters have shown that these requirements are not already sufficient for ensuring the rigorous designation process sought by the Joint Board.") Moreover, by making these requirements permissive for states the Commission determined that these requirements are not necessary to ensure that universal service funds are used properly. *ETC Criteria Order* at ¶ 62. Dobson questions whether the Commission should impose burdensome regulatory requirements that it agrees are not necessary.

CMRS carriers should be permitted to report progress within FCC-licensed service areas, such as Cellular Geographic Service Area ("CGSA") boundaries.

Fourth, Dobson notes that the statutory requirements for the use of support permit its use for the "provision, maintenance, and upgrading of facilities" for providing the supported services.[9] The network improvement plan's focus on "improvements or upgrades"[10] denies carriers any meaningful opportunity to demonstrate how support is used, consistent with the statute, for the "provision" or "maintenance" of facilities used to provide the supported services. Neither the Commission nor the states have the power to delete, with respect to competitive ETCs, two of the three uses of support permitted under section 254(e).

Finally, Dobson believes that it is extremely important that any network improvement plan obligation be imposed on ILEC ETCs as well as competitive ETCs. Dobson finds it inexplicable that, although the ILECs' networks are mature, and populations in many rural areas are declining, the ILECs continue to receive the vast majority of the multibillion-dollar high cost fund. While ILECs undoubtedly wish to upgrade their networks to provide DSL or other high-bandwidth services, broadband is not a supported service at this time. Apart from new investment to provide DSL, it is difficult to imagine how most rural ILECs can justify their high support amounts solely for the maintenance of their built-out networks. Dobson therefore believes that the Commission cannot, consistent with section 254(e), increase scrutiny on

[9] 47 U.S.C. § 254(e).

[10] 47 C.F.R. § 54.202(a)(1)(B) (as amended).

competitive ETCs' use of support without exercising similar stewardship over the bulk of the fund disbursed to ILEC ETCs.[11]

Dobson therefore requests that the Commission replace the five-year network improvement plan requirement with a requirement that carriers show annually how support will be used for the provision, maintenance, and upgrading of facilities to provide the supported services within the ETC's designated service area. If the filing requires projection only one year ahead, as it should, the required level of specificity could remain quite high; otherwise, the level of detail should be rationally related to the time period involved. The requirement should apply equally to all ETCs, particularly ILECs. In addition, instead of requiring extensive projections of future use of support, the Commission should require all ETCs, both wireless and wireline, to provide reports on use of support in prior periods, in order to ensure that funding is being used appropriately.

II. "REASONABLE REQUEST FOR SERVICE" AND BUILD-OUT REQUIREMENTS FOR CMRS CARRIERS ARE A MATTER OF FEDERAL LAW

In urging states to adopt requirements that ETC applicants demonstrate their commitment and ability to provide the supported services, the Commission concluded that states "should determine, pursuant to state law, what constitutes a 'reasonable request' for service."[12] The *ETC Criteria Order* also "encourage[d] states to follow the Joint Board's proposal that any build-out commitments adopted by the states 'be harmonized with existing policies regarding line

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[11] *See* 47 U.S.C. § 254(e) (requiring the FCC to ensure that carriers receiving federal universal service support use such support "only for the provision, maintenance, and upgrading of facilities and services for which the support is intended").

[12] *ETC Criteria Order* at ¶ 21.

extensions and carriers of last resort obligations.'"[13] The definition of a reasonable request for service, however, is a matter of federal law, and line extension and carrier of last resort obligations are entry regulations. Both of these areas are outside the jurisdiction of state commissions with respect to CMRS carriers, including CMRS carriers that are ETCs. State regulation of any of these issues is inconsistent with the "federal policy of a uniform, national and deregulatory framework for CMRS."[14] Thus, the Commission should reconsider these conclusions, and adopt the federal six-part service extension requirement[15] for all CMRS ETCs.

The requirement that a common carrier respond to a "reasonable request" for service is a central provision of section 201(a) of the federal Communications Act.[16] The Communications Act also defines common carriers,[17] and specifically addresses the extent to which CMRS carriers are to be treated as common carriers.[18] Thus, the meaning of a "reasonable request for service" is addressed by federal law.[19]

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[13] *Id.*

[14] *Truth-in-Billing and Billing Format; National Association of State Utility Consumer Advocates' Petition for Declaratory Ruling Regarding Truth-in-Billing*, CC Docket No. 98-170 and CG Docket No. 04-208, Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking, 20 FCC Rcd 6448 at ¶ 20 (2005) *("NASUCA Order & FNPRM").*

[15] *See ETC Criteria Order* at ¶ 22.

[16] 47 U.S.C. § 201(a).

[17] 47 U.S.C. § 153(10).

[18] 47 U.S.C. § 332(c)(1).

[19] *See First Report and Order*, FCC 97-57 ¶ 142 fn.349 (service obligation of ETCs is to provide service upon reasonable request in accordance with Section 201(a); *In the Matter of Western Wireless Corp. Petition for Designation as an Eligible Telecommunications Carrier in*
(continued on next page)

This is of particular concern for CMRS carriers, for whom there is a "federal policy of a uniform, national and deregulatory framework."[20] As the Commission has acknowledged, this framework "prescribed by Congress and implemented by the Commission has enabled competition to flourish, with substantial benefits to consumers."[21] Allowing individual states to define a "reasonable request for service" for CMRS carriers who are ETCs would erode the uniform, national regulatory scheme under which those CMRS carriers operate, and also undermine the Commission's deregulatory policy. Neither the Commission nor any party in this proceeding has presented any evidence suggesting that the importance of a uniform, national, deregulated market is any less when a CMRS carrier obtains ETC status. The goal of universal service, after all, is to secure the benefits of low prices and quality services for consumers[22] – the same goal as the national deregulatory CMRS policy.

Similarly, rules related to "line extensions" and carrier of last resort obligations are classic entry regulations, which states are preempted from imposing on CMRS carriers.[23] The Commission consistently has applied a broad interpretation of the preemptive effect of section 332(c)(3).[24] In addition, line extension requirements have a significant rate-regulation effect

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the State of Wyoming, CC Docket No. 96-45, Memorandum Opinion and Order, DA 00-2896, ¶ 12 fn. 36 (rel. Dec. 26, 2000) (same).

[20] *NASUCA Order & FNPRM* at ¶ 20.

[21] *NASUCA Order & FNPRM* at ¶ 20.

[22] *See, e.g.,* 47 U.S.C. § 254(b)(3).

[23] 47 U.S.C. § 332(c)(3).

[24] *See, e.g., NASUCA Order & FNPRM* at ¶ 30. *See also Petition of the State of Ohio for Authority to Continue to Regulate Commercial Mobile Radio Services*, PR Docket No. 94-109,
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which also is preempted under section 332(c)(3).[25] Most state line extension policies with regard to ILEC ETCs contemplate substantial line extension charges for potential customers that are located more than a certain distance (often a thousand feet) from an existing line. If a state with this type of line extension policy for its ILEC ETC "harmonized" that policy onto its CMRS ETCs, the state would effectively be mandating a rate (the line extension charge). Alternatively, if the state imposed the line extension obligation without the line extension charge, the CMRS carrier would be placed in the untenable position of being required to extend its service without any hope, in a competitive market, of recovering the cost.[26]

For all these reasons, the *ETC Criteria Order* was incorrect to suggest that states may "determine, pursuant to state law, what constitutes a 'reasonable request' for service" from a CMRS ETC, or that CMRS ETC build-out requirements should be harmonized with state policies regarding line extensions and carrier of last resort obligations. Thus, these statements should be reconsidered.

Report and Order, 10 FCC Rcd 7842, 7853 ("Section 332(c)(3) completely preempts state entry regulation of CMRS").

[25] For example the Minnesota Commission has a rule allowing a LEC to "assess special construction charges approved by the commission if existing facilities are not available to serve the customer." Rule Minn. R. 7812.0600, subp. 4 (2001). The appropriateness of such special construction charges is determined with reference to – among other things – the carrier's tariff provisions and rate of return. *See In re Request for Service in Qwest's Tofte Exchange*, 666 N.W.2d 391 (Minn. Ct. App. 2003). Unlike LECs, CRMS providers do not have tariffs, and their rates of return are not within the regulatory purview of state commissions.

[26] The Commission has recognized that "most states continue to provide at least some implicit support to residential customers through their rate designs." *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket 96-45, Order On Remand, Further Notice Of Proposed Rulemaking, And Memorandum Opinion And Order, FCC 03-249, ¶ 22 (rel. Oct. 27, 2003). These implicit subsidies, such as rate averaging and intrastate access rates are not available to CMRS providers. In addition CMRS providers (unlike ILECs) do not receive federal universal service funds based on actual costs incurred to meet such line extensions.

The Fifth Circuit's *Texas Office* case does not compel a different result. In that case, states "contended that Congress did not mean to prohibit the states from imposing service quality standards" consistent with state "regulation of intrastate service."[27] The Fifth Circuit agreed and overturned the Commission's blanket prohibition against any additional state eligibility criteria.[28] Any such additional criteria would, of course, need to be otherwise lawful in light of the preemptive effect of Section 253(a), limitations on state action in Section 254(f), and limitations on state regulation of wireless and interstate services in Sections 332 and 151. The Commission cannot provide blanket authorization for state service extension standards that have not been examined in light of these other provisions.[29]

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[27] *Texas Office of Public Utility Council v. FCC*, 183 F.3d 393 (5th Cir. 1999).

[28] *Id.* at 417

[29] The Commission recognized this in the context of service quality regulation. *ETC Criteria Order* at ¶ 21 (recognizing that state service regulations must be consistent with Sections 214, 254 and 332).

III. CONCLUSION

For the foregoing reasons, Dobson respectfully requests that the Commission reconsider its five-year service improvement plan requirement. Dobson also requests that the Commission reconsider its statements that states may impose state-law extension of lines or carrier of last resort obligations on CMRS ETCs.

Respectfully submitted,

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